No. 80-948

IN THE

Supreme Court of the United States

October Term, 1980

ARMORED TRANSPORT, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GIBSON, DUNN & CRUTCHER,
JOHN J. HANSON,
DON HOWARTH,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7312,
Attorneys for Petitioner
Armored Transport, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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I.

INTRODUCTION.

The petition for writ of certiorari was timely filed herein on December 6, 1980. Although the government obtained an extension of time to respond to February 2, 1981,[1] no opposition to the petition was in fact filed on or before that date. One week later, on February 9, 1981, the government filed an untimely document described as a brief in opposition.

Distilled to its essentials, the government's untimely brief opposes review on three grounds: (1) the decision of the Ninth Circuit that corporations and other non-natural per-

[1]The Clerk's letter of January 7, 1981 states clearly, "Your recent request for an extension of time . . . has been granted, and the time has been extended but only to and including February 2, 1981. No further extensions will be granted. . . ."

sons may be prosecuted for felony violations without the Fifth Amendment guarantee of an indictment is correct and does not conflict with the decisions of other courts; (2) the ruling is "unlikely to have any significant practical effect on further proceedings" because the government ordinarily will proceed against all parties by way of indictment as a matter of preference, even without the existence of a constitutional right; and (3) an admittedly invalid indictment can be salvaged after the fact by treating it as an information since no prejudice follows from such a procedure.

In addition to the above arguments, and despite the fact that it has filed no cross-petition for certiorari, the government further asserts that the Ninth Circuit was wrong in holding this indictment invalid because it was rendered after the term of the grand jury expired. Similarly the government asserts that both the Ninth Circuit and the district court erred in holding that an indictment rendered by a grand jury whose term has expired is a nullity that creates a non-waivable jurisdictional defect which can be raised at any time. Instead, the government says that such an invalid indictment is a mere formal defect that cannot be raised by what it terms "collateral attack."

For the reasons discussed herein, the government's contentions are without merit, and review should be granted.

II.

THE NINTH CIRCUIT RULING CONFLICTS WITH NUMEROUS PRIOR RULINGS AND PRESENTS IMPORTANT CONSTITUTIONAL ISSUES OF GENERAL APPLICABILITY.

In its strained attempt to trivialize the fundamental issues presented here, the government's brief totally ignores hundreds of years of history and the decisions of this Court and other federal tribunals. As outlined on pages 6-10 of the petition, the common law of England, followed by the

Founding Fathers in drafting the indictment clause of the Fifth Amendment, and the rulings of numerous federal courts establish that indictments are required in all felony prosecutions. *E.g., Stirone v. United States,* 361 U.S. 212, 215 (1960): "The crime charged here is a felony and the Fifth Amendment requires that the prosecution be begun by indictment." The petition at the pages indicated cites decisions of the Sixth Circuit, the D.C. Circuit, the Third Circuit, the Fifth Circuit and various district courts, all of which reflect the understanding that all felonies are infamous or serious crimes which trigger the Fifth Amendment indictment guarantee. The government apparently asks this Court to ignore the unique view of the Ninth Circuit, which would select for special treatment all corporations and non-natural persons (such as partnerships, unincorporated associations and others which cannot be imprisoned) and would deny them the critical Fifth Amendment protection of an indictment.

The government further suggests that the denial of this constitutional right to an entire class of entities need not be taken seriously. Even without such a guarantee the government asserts that it can be expected to proceed by indictment as a general matter of preference. But this is no more credible than the government's out-of-hand dismissal of the history and fundamental purposes of the right to an indictment on serious felony charges. The fact that the government has not attempted to proceed by information in such cases in the past may have resulted in a lack of precedent on this issue, but it provides absolutely no security for the future. Instead, the government's indictment practice simply reflects its understanding and construction, shared almost universally, that felony charges require an indictment. The government did not attempt to proceed by an information in the first instance even in this case. Its position that it does

not need an indictment has been urged only as a post hoc rationalization to save a moribund indictment and to suit its own convenience.

The assertion that the new rule of law in the Ninth Circuit will have no immediate and recurring impact on corporations and other fictional entities and the government's promise that it will "go and sin no more" is plainly belied by the Ninth Circuit's opinion in *United States v. Yellow Freight System, Inc.*, ... F.2d .... (9th Cir. 1980) (slip op.), rendered on October 17, just 10 days after the opinion in this case. Conjecture about how the government may choose to proceed in the future cannot substitute for enforcement of the constitutional right to an indictment.

III.

WHERE THE GOVERNMENT HAS PROCEEDED BY INDICTMENT, AN INVALID JUDGMENT ENTERED THEREON CANNOT BE REVIVED EVEN IF PROSECUTION COULD HAVE BEEN BY INFORMATION.

In its opposition, the government argues that since there is no constitutional right to an indictment, the invalid indictment here may form the basis for sustaining a conviction because no negative consequences followed from the indictment. Such a procedure of rewriting the record against a criminal defendant by hindsight denies fundamental due process protections. *See United States v. Pandilidis*, 524 F.2d 644 (6th Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) and *United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) (en banc), discussed at pages 14-16 of the petition. Further, to salvage a jurisdictionally deficient conviction by speculation as to what the government could have done allows the government to obtain the benefits of proceeding by indictment without shouldering the attendant burdens.

Even if a showing of prejudice were required, it is plainly present here. The "negative consequences" which followed

for the corporation included a felony conviction and a fine in the amount of $200,000, all pursuant to a nolo plea which would not have been entered had the defendant known of the indictment's invalidity at the time of its plea.[2]

IV.

THE NINTH CIRCUIT CORRECTLY RULED THAT AN INDICTMENT RETURNED BY A GRAND JURY WHOSE TERM HAS EXPIRED IS A NULLITY AND CREATES A NON-WAIVABLE JURISDICTIONAL DEFECT.

Even if this Court were to consider the government's challenge to portions of the Ninth Circuit's ruling herein without the filing of a cross-petition,[3] it is plain that both the district court and the Ninth Circuit correctly recognized the well-established rule that an indictment returned by a grand jury whose term has expired is a nullity. Pet. App. A-3, B-8. Such invalidity creates a non-waivable jurisdictional defect which can be raised at any time during the proceedings. The Ninth Circuit stated: "If, however, the first date of service is the impanelment date, the indictment is invalid because handed down by an expired grand jury. [Citations omitted.] Such a defect — that the grand jury lost its power to hand down indictments — is jurisdictional and may be raised at any time. [Citations omitted.]" Pet. App. A-3.[4]

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[2]Even the district court held that the date on which the grand jury began to serve was not disclosed by the government until after the nolo pleas were entered. Pet. App. B-2.

[3]Supreme Court Rule 21.1(a) provides, "Only the questions set forth in the petition or fairly included therein will be considered by the Court." *See, e.g., Namet v. United States*, 373 U.S. 179, 190 (1963).

[4]*See also United States v. Gale*, 109 U.S. 65, 72 (1883); *United States v. Macklin*, 523 F.2d 193 (2d Cir. 1975); *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *Evaporated Milk Ass'n v. Roche*, 130 F.2d 843 (9th Cir. 1942), *rev'd on other grounds*, 319 U.S. 21 (1943); *United States v. Perlstein*, 39 F.Supp. 965, 970 (D.N.J.), *aff'd*, 126 F.2d 789 (3d Cir. 1941), *cert. denied*, 316 U.S. 678 (1942); *United States v. McKay*, 45 F.Supp. 1007 (E.D. Mich. 1942); *see United States v. Johnson*, 319 U.S. 503, 508 (1943); *Ex Parte Bain*, 121 U.S. 1, 13 (1887).

Thus, the government's attempt to argue that the defect in the indictment here was one of mere formality which cannot be raised by "collateral attack" must fail because it is not properly raised and because it is totally contrary to all applicable authorities and was rejected both by the Ninth Circuit and the district court.

The government's contentions that this case is not appropriate for writ of certiorari because all that is involved is the interaction of Federal Rule of Criminal Procedure 6(g) and a local rule, and that petitioner should have raised the issue of the invalidity before entering its plea, must be rejected for the same reasons. What was at stake below was not some peculiar local rule but the fundamental issue of whether by court rule or judicial intent the limited statutory 18-month life of a grand jury could be extended. The Ninth Circuit properly held that no such extension is possible and that no indictment or jurisdiction may flow from a grand jury that has lost its power to act. Both courts below also correctly held not only that the matter could be raised at any time but also that the reason it was not raised before the plea and conviction was that the government deliberately chose to suppress the facts regarding the date of impanelment. Indeed, the government only disclosed such facts after the government attorney in charge of this prosecution had resigned and filed an amicus petition setting forth the impanelment date and revealing that the indictment issued after the grand jury became powerless. As stated by the district court, "These motions were not raised earlier because the date of the swearing of the grand jury was not revealed by the Government until after the nolo pleas were entered." Pet. App. B-2.

V.

CONCLUSION.

For all the reasons stated above and in the petition herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: February 12, 1981.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,

JOHN J. HANSON,

DON HOWARTH,

Attorneys for Petitioner
Armored Transport, Inc.